ORIGINAL

RESPONSE REQUESTED

NO. 00-18

Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondents, James Ward, Jimmy Scroger, and Christopher Guido, by and through their court appointed counsel, Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, respectfully request this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Brief for Respondents in Opposition. In support of this request, Respondents state that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the

RECEIVED
NOV 27 2000

17 pp

Tenth Circuit, and they are unable to retain counsel and pay for the costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Respondents, James Ward, Jimmy Scroger, and Christopher Guido, respectfully request that they be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender
Jill M. Wichlens
JILL M. WICHLENS
Assistant Federal Public Defender
Counsel of Record for Respondents
1099 18th Street, Plaza Tower #300
Denver, Colorado 80202
(303) 294-7002

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, Warden, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

[illegible] 2 7 2000

MICHAEL G. KATZ
Federal Public Defender

JILL M. WICHLENS
Assistant Federal Public Defender
Counsel of Record for Respondents
1099 18th Street, Plaza Tower #300
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

Whether the Bureau of Prisons has discretion under 18 U.S.C. § 3621(e)(2)(B) to deny early release to all drug offenders who received an enhancement at sentencing pursuant to U.S.S.G. §2D1.1(b)(1), the enhancement applicable if a dangerous weapon "was possessed."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 5

CONCLUSION 7

AFFIDAVIT OF SERVICE 1

AFFIDAVIT OF MAILING 1

TABLE OF AUTHORITIES

Page

CASES

Booker v. Ward,
202 F.3d 1249 (10th Cir. 2000) 4

Center for Auto Safety v. Dole,
828 F.2d 799, 806 (D.C. Cir. 1987),
vacated on other grounds, 896 F.2d 1532 (D.C. Cir. 1988) 6

United States v. McFarlane,
933 F.2d 898, 899 (10th Cir. 1991),
cert. denied, 118 S.Ct. 1109 (1998) 3

United States v. Smith,
131 F.3d 1392, 1400 (10th Cir. 1997) 3

STATUTES

18 U.S.C. § 3621(e) 1

18 U.S.C. § 3621(e)(2)(B) 4

21 U.S.C. § 841 2

28 U.S.C. § 2241 4

OTHER

28 C.F.R. §550.58(a)(1)(vi)(B) 1, 5

U.S.S.G. §2D1.1 2

U.S.S.G. §2D1.1(b)(1) 3-6

U.S.S.G. §2D1.11 2

OPINION BELOW

Respondents agree with petitioner's statement as to the opinions below.

JURISDICTION

Respondents agree with petitioner's statement as to jurisdiction.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Respondents agree with petitioner's statement of the statutory and regulatory provisions involved with the exception of petitioner's failure to set out the Bureau of Prisons Program Statement issued to implement the relevant regulation, 28 C.F.R. §550.58(a)(1)(vi)(B) (1997). That Program Statement provides in pertinent part:

> 7. OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed in either this section or Section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.
>
> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.
>
> Inmates whose current offense is a felony that:
>
> - has an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

- involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

- by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

- by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

* * * * *

b. Criminal Offenses with a Specific Offense Characteristic Enhancement. Convictions for an offense listed below, like those listed in Section 7.a., may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

> Example: Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines §2D1.1, application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

Bureau of Prisons Program Statement 5162.04 at 8-9, 11-12 (1997).

STATEMENT OF THE CASE

Respondents James Ward, Jimmy Scroger and Christopher Guido were convicted of felony drug offenses in unrelated cases. At sentencing, each received an upward adjustment to his offense level pursuant to U.S.S.G. §2D1.1(b)(1). Section 2D1.1(b)(1) increases the defendant's sentence in a drug case "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. §2D1.1(b)(1). Under Tenth Circuit law, the enhancement may be applied even if it was not the defendant who possessed the weapon. See United States v. Smith, 131 F.3d 1392, 1400 (10th Cir. 1997) (quoting United States v. McFarlane, 933 F.2d 898, 899 (10th Cir. 1991) ("Personal possession of a firearm ... is not necessary [under §2D1.1(b)(1)] ... The sentencing court may 'attribute to a defendant weapons possessed by his co-defendants if the possession of weapons was known to the defendant or reasonably foreseeable by him.'"), cert. denied, 118 S.Ct. 1109 (1998).

The specific facts of each respondents' receipt of a §2D1.1(b)(1) enhancement are as follows: In respondent Ward's case, the weapons in question were found in a safe in Ward's roommate/co-defendant's bedroom. Ward Doc. 13: Opinion of the district court, reported at 38 F.Supp. 2d 1258 (D. Kan. 1999). In respondent Scroger's case, the weapons in question were found in a residence at which Scroger and another person were present. Scroger Doc. 8: BOP Answer and Return filed 10/8/98. In respondent Guido's case, the enhancement was based on a firearm found on Guido's person. Guido Doc. 9: Opinion of the district court, reported at 37 F.Supp.2d 1289 (D. Kan. 1999).

While in custody, each respondent successfully completed the residential phase of the BOP "Comprehensive Drug Abuse Treatment Program." Ward op. at 2; Scroger Doc. 10:

Opinion of the district court, reported at 39 F.Supp.2d 1296 (D. Kan. 1999); Guido op. at 2. Each sought a one-year reduction in sentence pursuant to 18 U.S.C. § 3621(e)(2)(B), which provides that "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve." Each respondent was denied early release based on his receipt at sentencing of an adjustment pursuant to U.S.S.G. §2D1.1(b)(1). Ward op. at 3-4; Scroger op. at 2-3; Guido op. at 2-3.

Pursuant to 28 U.S.C. § 2241, each respondent filed a pro so petition for relief in the United States District Court for the District of Kansas.[1] Ward, Scroger, and Guido op's at 1. The district court granted relief in each case and ordered petitioner to reconsider respondents' requests for a sentence reduction without regard to their receipt of sentencing adjustments pursuant to §2D1.1(b)(1). Id.

Petitioner complied with the district court's order, found no other basis for denying respondents' requests, and reduced respondents' sentences by one year. Id. Each respondent has now completed the custodial portion of his sentence and is on supervised release.

Petitioner appealed the district court orders directing reconsideration of respondents' requests. The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision in each case. See Booker v. Ward, 202 F.3d 1249 (10th Cir. 2000). The Tenth Circuit denied petitioner's request for panel rehearing and for rehearing en banc.

---

[1] The district court found that each respondent had either exhausted his administrative remedies before filing a § 2241 petition or that exhaustion would be futile. Ward op. at 6-7; Scroger op. at 3; Guido op. at 3-5.

ARGUMENT

1. It is a program statement, not a regulation, that disqualifies inmates such as respondents from early release.

Petitioner argued on appeal that its latest method for disqualifying drug offenders with weapon enhancements from early release, by way of 28 C.F.R. §550.58(a)(1)(vi)(B), is entitled to deference because "the new BOP rule, unlike the old program statement, is a formal agency regulation published in the Federal Register and Code of Federal Regulations." Petitioner's Opening Brief on Appeal at 14. This argument was based on the mistaken assumption that it is the new *regulation* that disqualifies drug offenders with §2D1.1(b)(1) enhancements rather than the new *program statement*. In fact, it is the new program statement, not the new regulation, that disqualifies such offenders. The new regulation does not even address §2D1.1(b)(1). It provides instead for the disqualification of inmates whose current offense "involved the carrying, possession, or use of a firearm." 28 C.F.R. § 550.58(a)(vi)(B) (1997).

The new program statement, by contrast, unequivocally disqualifies any felony drug offender who "received a two-level enhancement for possession of a firearm." P.S. 5162.04 at 12 (1997). The new program statement does not distinguish between inmates who received a §2D1.1(b)(1) adjustment because they personally possessed a firearm, and inmates who received a §2D1.1(b)(1) adjustment because their co-defendant possessed a firearm. Thus, it is the program statement, not the regulation, that disqualifies inmates such as respondents.

That it is the new program statement that disqualifies §2D1.1(b)(1) recipients, not the new regulation, is further shown by the following example: A drug offender receives a §2D1.1(b)(1) enhancement at sentencing based on his co-defendant's possession of a gun.

Following drug treatment, the inmate requests early release. Under the new regulation, the inmate's case manager must decide whether the inmate's offense involved the carrying, possession, or use of a firearm. Because the *inmate's* offense did not involve a firearm, the answer would be no, and the inmate would not be disqualified.

Under the new program statement, however, the case manager would not have to decide whether the *inmate's* offense involved a firearm. The fact that the inmate received a §2D1.1(b)(1) adjustment, for whatever reason, would end the inquiry.[2]

2. The program statement at issue here is invalid because it conflicts with the regulation under which it was issued.

It is well established that, even if a statute gives an agency discretion over a matter, the agency can limit its discretion by promulgating regulations on the subject. See, e.g., Center for Auto Safety v. Dole, 828 F.2d 799, 806 (D.C. Cir. 1987), vacated on other grounds, 896 F.2d 1532 (D.C. Cir. 1988) ("[A] court will require an agency to follow the legal standards contained in its own regulations despite the fact that a statute has granted the agency discretion in the matter.")

In this case, petitioner's program statement conflicts with its regulation. The regulation disqualifies inmates based on elements of, or conduct underlying, the *inmate's* offense. The program statement, on the other hand, allows disqualification based on conduct underlying a *third party's* offense. This inconsistency is unlawful and requires invalidation of the program statement under which respondents were denied early release. In the alternative, the program

---

[2] The stated basis for disqualifying each respondent in this case was the program statement, not the regulation. See Ward op. at 28; Scroger op. at 29; Guido op. at 26.

statement is invalid as applied to respondents' Ward and Scroger because they did not personally possess the weapons upon which the enhancement of their sentences was based.

Because the Tenth Circuit correctly affirmed the district court's orders in this case, the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

Jill M. Wichlens

JILL M. WICHLENS
Assistant Federal Public Defender
1099 18th Street, Plaza Tower #300
Denver, Colorado 80202
(303) 294-7002

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, Warden, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF SERVICE

Jill M. Wichlens, Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondents in Opposition was served on counsel for the Petitioner by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Seth P. Waxman
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80201, on November 20, 2000, and all parties required to be served have been served.

Jill M. Wichlens

JILL M. WICHLENS
Assistant Federal Public Defender
Counsel of Record for Respondents
1099 18th Street, Plaza Tower #300
Denver, Colorado 80202
(303) 294-7002

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of November, 2000.

Janice Kuelper

Janice Kuelper
Notary Public

My Commission Expires:

January 27, 2001

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF MAILING

Jenine Jensen, Assistant Federal Public Defender, a member of the Bar of this Court, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondents in Opposition was enclosed in an envelope, first-class postage prepaid and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80201, on November 20, 2000, and all parties required to be served have been served.

JENINE JENSEN
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of November, 2000.

Janice Kuelper
Notary Public

My Commission Expires:

January 27, 2001